United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1404

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

FRANK BERNARDINI,

Plaintiff-Appellee,

—against—

REDERI A/B SATURNUS,

Defendant-Appellant and Third-Party Plaintiff-Appellant,

—against—

INTERNATIONAL TERMINAL OPERATING CO. INC.,

Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THIRD-PARTY DEFENDANT-APPELLEE

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Statement

This is an appeal by the defendant, REDERI A/B SATURNUS, from a judgment in favor of the plaintiff for $10,000.00 and a dismissal of the third-party complaint against International Terminal Operating Co., Inc. This case was tried before the Hon. Robert J. Ward and a jury which answered special questions with respect to the issues set forth by the complaint and the third-party complaint. In answering these special questions the jury found that the

defendant was negligent, its vessel, the SS SVENSKUND, was not unseaworthy and the plaintiff was free of any contributory negligence. As to the third-party complaint the jury found that I.T.O. had not breached its warranty of workmanlike performance.

The Facts

On October 28, 1969 plaintiff was a longshoreman employed by International Terminal Operating Co., Inc., and had gone aboard the SS SVENSKUND, a vessel owned by the defendant Rederi A/B Saturnus, for the purpose of working in the #4 hatch. Plaintiff testified that he was hired by the third-party defendant on the day of his accident when he shaped up at the union hall (80a). He said that he went aboard the defendant's vessel for the first time at 8:45 A.M. (104a) and the accident happened at 8:50 A.M. (235a) before he had an opportunity to do any work for the third-party defendant since he was in the process of looking for a ladder to descend into the #4 hatch when the accident happened (80a, 84a-89a).

It was his testimony that he boarded the vessel by means of the gangway and then walked aft on the weatherdeck towards the #4 hatch (80a-84a). He then walked across in front of the #4 hatch to the offshore side of the vessel where he spoke to a longshoreman rigging the boom and inquired as to the whereabouts of the ladder leading down into the #4 hatch (86a). This man indicated by pointing that the ladder was near the inshore, aft corner of the hatch (86a-88a). Plaintiff then continued walking in an aft direction on the offshore side (87a), walked behind the #4 hatch towards the inshore side and as he was making a left turn at the starboard aft end of the #4 hatch he heard a cracking sound (88a) causing him to look upward across the hatch in an offshore direction. He then

continued walking forward on the inshore side and testified that he slipped on some grease spots, which he was unable to dodge, and fell on a pallet walkway (89a).

The chief mate, Rune Stahl, testified that he went on duty at 7:30 A.M. on the day of plaintiff's accident (420a), had walked around the #4 hatch three or four times between 7:30 A.M. and 8:50 A.M. (450a) and was standing alongside the #4 hatch on the inshore side when the plaintiff's accident happened (420a, 421a, 429a).

Captain Stahl testified that he was on duty on the day of the plaintiff's accident (419a), had supervised the crew in opening the hatches (448a) and had not seen any oil or grease on the deck in the vicinity where plaintiff claims he fell (449a, 450a).

Captain Stahl further testified that it was his job to look out for safety aboard the vessel (430a, 448a, 454a) and that he had specific orders from the defendant shipping company to look out for safety conditions on the vessel (432a). He further testified that if there was oil or grease on the vessel and he did not do something about it and someone was injured that he would be held responsible (431a, 449a, 453a, 454a).

Although Captain Stahl testified that he saw the plaintiff look around and then get down on his knees and lay down on the pallets (325a, 326a, 429a, 433a), which he construed to be play acting on the part of the plaintiff (345a, 346a), Mr. Bernardini claimed he fell and also advised Captain Stahl that he was claiming an unsafe passage (434a, 453a, 489a).

It further appeared from Captain Stahl's testimony that the ship's crew oiled the wheels on the hatch covers of the #4 hatch during the voyage (349a, 350a), that this was done by the ship's carpenter (445a, 446a), and if any

oil or grease dripped on to the deck it was the duty of the ship's carpenter to clean it up (446a, 447a).

The testimony in this case further showed that there was a pallet walkway running from the hatch coaming to the ship's railing on the starboard side of the #4 hatch (91a, 92a). Both Captain Stahl and Captain Wheeler, third-party defendant's maritime expert, testified that there was nothing unusual about such a walkway (332a, 444a, 505a, 506a, 507a, 525a), that it was customary for longshoremen to use such walkways and that the use of such a walkway would not constitute an unworkmanlike performance by the stevedore (507a, 508a, 509a).

Captain Wheeler further testified that he agreed with Captain Stahl that he was responsible for the safe condition of the deck (536a), and that it was Captain Stahl's job to look out for safety aboard the vessel (537a). Captain Wheeler also testified that he agreed with Captain Stahl that, if there was any oil or grease on the vessel, it was his obligation to have it removed (537a, 538a), if there was anything unsafe about the deck Captain Stahl was responsible for the condition of the deck and it was his obligation to remove any oil or grease or to have the pallet walkway removed if he thought it was unsafe or dangerous (538a).

The various motions made at different junctures of the case were denied by the Court. The Court, in denying the defendant's post trial motion, said that the plaintiff's testimony, which the jury chose to believe, provided the probative evidence required to support the jury's verdict (46a).

POINT I

The testimony in this case presented a question of fact for jury determination and the jury's verdict, being supported by the evidence, dictates affirmance by this Court under controlling decisions.

On the basis of the testimony in this case the jury found that the defendant was negligent and its vessel the SS SVENSKUND was not unseaworthy. In spite of the fact that Captain Stahl testified that the plaintiff "faked" an accident in this case, it is obvious that the jury rejected Captain Stahl's testimony and believed the plaintiff's claim of an unsafe passageway.

The finding of negligence on the part of the defendant does not imply a jury finding of a breach of any of the housekeeping sections of the Safety Regulations for Longshoring. Obviously the jury's finding of negligence on the part of the defendant deals with the safety of the deck in the vicinity of the #4 hatch where the plaintiff's accident happened, which safety Captain Stahl accepted the responsibility for by unequivocally testifying that it was his job to look out for safety conditions on the vessel (430a, 448a, 454a).

It was the duty of the ship-owner to furnish the plaintiff with a safe place in which to work and a vessel reasonably fit for its intended purpose. This was a nondelegable duty, *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539. While the housekeeping sections of the safety regulations do provide that the employer shall remove all loose tripping or stumbling hazards and that slippery conditions shall be eliminated as they occur, Section 1504.2(b) provides "nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from re-

sponsibilities or duties now placed upon them by law, regulation or custom".

While there is no way to determine in what respects the jury decided that the defendant ship-owner was negligent the jury could well have found (and undoubtedly did find) that whatever unsafe passageway or unsafe conditions existed were due to the negligence of the chief mate, who was concededly responsible for such conditions, in not correcting or removing the same. The jury in answering a special interrogatory found that the defendant had not established its claim that the third party defendant breached its warranty of workmanlike performance. This finding by the jury clearly exonerates the third party defendant from any finding of a breach of the housekeeping sections of the safety regulations which were expressly contained in the court's charge to the jury (701a, 702a, 703a).

Defendant and third party plaintiff-appellant is incorrect in stating that the Court refused to charge that a breach by the stevedore of the safety regulations for longshoring compelled a verdict of indemnity in favor of the ship-owner. The fact of the matter is that the Court did charge that I.T.O.'s warranty of workmanlike performance required it to see that its longshoremen worked under reasonably safe conditions and if the working conditions were unsafe I.T.O. was under a duty to discontinue operations on its own initiative or as soon as it knew or should have known it would be unsafe to continue (713a). The Court further charged the jury that if they found that the ship-owner had established that I.T.O. had breached its warranty of workmanlike performance the ship-owner was entitled to recover indemnity (714a).

Since there was no testimony in this case as to how long the grease spots, upon which the plaintiff slipped and

fell, were on the deck there was no proof that I.T.O. had knowledge or constructive notice of the presence of these grease spots or an opportunity to remove the same. There was, however, abundant proof in the record to the effect that Captain Stahl was responsible for safety conditions aboard the vessel (430a, 448a, 454a, 432a) and specifically for maintenance of the deck and the area where the plaintiff fell as well as proof that Captain Stahl had walked around the #4 hatch three or four times between 7:30 A.M. on the day of plaintiff's accident and 8:50 A.M. (450a) and was within 20 feet of the spot where plaintiff fell (421a, 429a) when the accident happened.

Since both Captain Stahl and Captain Wheeler testified that there was nothing unusual about the pallet walkway (332a, 444a, 505a-507a, 525a) and that the use of such a walkway would not constitute an unworkmanlike performance by the stevedore (507a-509a) it would appear that the jury found the defendant negligent because of the failure of Captain Stahl to see the grease upon which the plaintiff fell and to have the same removed. The jury chose to believe the plaintiff's claim that he had slipped on grease rather than Captain Stahl's testimony that the plaintiff had "faked" the accident, and since the proof in the case showed that the only one who had notice of this condition and an opportunity to correct the same was the ship-owner this was the basis for its finding of negligence.

The duties and obligations of the ship-owner to a longshoreman injured aboard a ship and the question of whether a stevedore has breached its warranty of workmanlike performance are issues of fact to be determined by the jury. *Weyerhauser Steam Ship Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, 78 S.Ct. 438. In the *Weyerhauser* case, *supra*, the Supreme Court of the United States

held that the evidence bearing on whether or not a stevedore performed the stevedoring services in a workmanlike manner was for jury consideration under appropriate instructions.

The Seventh Amendment to the Constitution of the United States provides:

> "In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, *and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*" (Italics supplied)

The primary purpose of such amendment was the preservation of the common law distinction between the province of the Court and that of the jury whereby issues of law are resolved by the Court and issues of fact are resolved by the jury under appropriate instructions of the Court. *Baltimore & C. Line* v. *Redman,* 295 U.S. 654, *Dimick* v. *Scheidt,* 293 U.S. 474.

An Appellate Court should not substitute its judgment for that of the jury's and where the evidence is susceptible of different conclusions by reasonable men the issues must be resolved by the jury. *Dennis* v. *Denver & Rio Grande Western Railroad Co.,* 375 U.S. 208, *Scheimann* v. *Grace Lines, Inc.,* 267 F. 2d 596.

The function of the court with respect to a jury verdict has been enunciated in *Lavender* v. *Kurn,* 327 U.S. 645, wherein the Supreme Court of the United States held that it is only when there is a complete absence of probative facts to support the conclusions reached by the jury that reversible error may appear. However, where there is an

evidentiary basis for the jury's verdict the Appellate Court's function is exhausted and it becomes immaterial whether that Court might feel that another conclusion is more reasonable.

As the Trial Judge pointed out in his opinion denying the defendant's post trial motion, the plaintiff's testimony, which the jury chose to believe, provides the probative evidence required to support the jury's verdict. Despite the contentions made by the defendant and third-party plaintiff-appellant this is not a case where the evidence was so strongly and overwhelmingly in favor of the defendant that reasonable and fair minded men in the exercise of impartial judgment could not have arrived at the verdict which the jury in this case reached. There was a sharp issue of fact with respect to the credibility of the plaintiff and Captain Stahl. However, it was in the province of the jury to resolve this question of credibility which they did in choosing to believe the plaintiff.

In *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines*, 369 U.S. 355, 82 S. Ct. 780, the Supreme Court, in dealing with a ship-owner's claim for indemnity against the stevedore arising out of injuries suffered by a longshoreman, held that it was a question of fact for the jury whether the injuries suffered by the longshoreman resulted from any unworkmanlike performance by his employer and reversed the Court of Appeals, thus reinstating a jury verdict in favor of the stevedore.

The Supreme Court in *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines*, said (pages 358, 359 and 364).

> "We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by

the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.'

* * * * *

Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search of one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment. Arnold v. Panhandle & S.F.R. Co., 353 U.S. 360, 77 S. Ct. 840, 1 L.Ed. 2d 889. Cf. Dick v. New York Life Ins. Co., 359 U.S. 437, 446, 79 S. Ct. 921, 927, 3 L. Ed. 2d 935.

Reversed." (Italics Supplied)

The jury's answers to the special interrogatories, submitted to them by the Court (13a, 14a), are consistent with the testimony in this case. Manifestly the jury could have found that Captain Stahl was responsible for the condition of the deck in the area where the plaintiff fell and was the only one in a position to see the grease upon which the plaintiff slipped and should have caused the same to be removed. Since Captain Stahl was an eye witness to the occurrence of the plaintiff's accident, had walked around the #4 hatch three or four times prior thereto and was, by his own admission, responsible for the safety conditions in the area where the accident happened, his failure to furnish the plaintiff with a safe place within which to work would constitute negligence on the part of the ship-owner.

In dealing with the issues of whether the defendant was negligent, whether the plaintiff was guilty of any contrib-

utory negligence and whether the stevedoring services were performed in a workmanlike manner the jury in this case determined that the defendant was negligent, that the plaintiff was not guilty of any contributory negligence and that I.T.O. had not breached its warranty of workmanlike performance (13a, 14a).

Under these circumstances this court should not, and, we respectfuliy submit, cannot substitute its own judgment for that of the jury for this would be contrary to the Seventh Amendment and inconsistent with the decisions of the Supreme Court in *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines*, 369 U.S. 355, 82 S. Ct. 780 and *International Terminal Operating Co., Inc.* v. *N.V. Nederl. Amerik. Stoomv.Maats.*, 393 U.S. 74, 89 S. Ct. 53. See also, the affirmance off the bench by this Court in *Napolitano* v. *Erie Lackawanna Railway Co.*, 495 F.2d 1367, 2 Cir., May 6, 1974.

POINT II

The jury's verdict on the third-party complaint was proper in all respects, is supported by the evidence, and, as has been indicated under Point I, was solely within the jury's province to decide.

Indemnity is only awarded to a ship-owner when the proof in a given situation establishes that the stevedore has breached its warranty of workmanlike performance. This is because the unworkmanlike service of the stevedore has cast the ship-owner into liability for something that was not the ship-owner's fault. *Ryan Stevedoring Co. Inc.* v. *Pan Atlantic Steam Ship Co.*, 350 U.S. 124, *DeGioia* v. *United States Line Co.*, 304 F. 2d 421 (2 Cir. 1962).

The primary source of the ship-owner's right to indemnity is his non-delegable duty to provide a seaworthy

ship by virtue of which he may be held vicariously liable for injuries caused by a condition created or activated by the stevedore's conduct. *Waterman S.S. Corp.* v. *Dugan and McNamara Inc.*, 364 U.S. 421. However, when the ship-owner is *not* found liable under the doctrine of unseaworthiness and *is* found to be liable for its own negligence, as in this case, coupled with a finding by the jury that the stevedore did not breach its warranty of workmanlike service, manifestly there can be no requirement of indemnity. Certainly a ship-owner is not entitled to be indemnified for its own negligence.

The circumstance which gives rise to the implied warranty of workmanlike performance is the duty of seaworthiness owed to business invitees by the party seeking indemnification. *Italia* v. *Oregon Stevedoring Co. Inc.*, 376 U.S. 323, 84 S. Ct. 748. In view of the fact that the jury found no unseaworthy condition to be present aboard the defendant's vessel, but did find that the defendant was negligent there can be no requirement of indemnification on the part of the stevedore.

Further, the specific finding of fact by the jury that the stevedore did not breach its warranty of workmanlike performance exonerates the stevedore from any liability for indemnification. The proposition that the question of whether a stevedore has breached its warranty of workmanlike performance is an issue of fact to be determined by the jury first enunciated in the *Weyerhauser* case, *supra*, was re-articulated recently in *International Terminal Operating Co. Inc.* v. *N.V. Nederl. Amerik. Stoomv. Maats.*, 393 U.S. 74, 89 S. Ct. 53.

In *Humble Oil Refinery Co.* v. *Philadelphia Maintenance Co.*, 444 F. 2d 727 (3 Cir. 1971). The Court said (page 733):

> "if the jury concludes that the stevedore is free from all responsibility for a longshoreman's injury no indemnity may be found as a matter of law. *International Terminal Operating Co. Inc.* v. *N.V. Nederl. Amerik. Stoomv. Maats.* 393 U.S. 74, 89 S. Ct. 53, 21 L.Ed. 2d 58 (1968)."

The function of a reviewing court then is solely to determine whether there is evidence to support the verdict. It is not the function of an Appellate Court to decide factual issues de novo and this Court should give deference to the decision of the triers of the facts who are usually in a superior position to appraise and weigh the evidence. *Zenith Radio Corp.* v. *Hazeltine Research Inc.*, 395 U.S. 100, 89 S.Ct. 1562. In *Tennant* v. *Peoria & P.U. Ry., Co.,* 321 U.S. 29, the Supreme Court of the United States stated the rule (page 35)

> "It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. * * * *That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*" (Italics supplied)

There is ample testimony in this case reflecting conduct on the part of the ship-owner constituting negligence while there is no evidence in this case reflecting any conduct on the part of the stevedore which would constitute a breach of its warranty of workmanlike performance.

Despite the misplaced emphasis upon *Frasca* v. *S/S Safina E. Ismail,* 431 F. 2d 259 (4 Cir. 1969), by the defendant and third-party plaintiff-appellant, the jury verdict in this case does not necessarily imply a breach by the stevedore of the housekeeping sections of the safety regulations. In *Frasca* a breach of the regulations leading to indemnity from the third-party defendant was found because of its failure to discover a stevedore's bar, over which the plainitff stumbled, after it had an opportunity to see it and do so. In *the within case there was no proof adduced by the ship-owner that I.T.O. had notice of the grease upon which the plaintiff slipped or had an opportunity to remove the same. Calderola* v. *Cunard,* 279 F. 2d 475.

The reasonableness of the stevedore's actions cannot be determined as a matter of law nor can they be evaluated in isolation, but must be evaluated within the context of the entire case and once that conduct has been evaluated by a jury an Appellate Court should not substitute its own judgment for that of the jury.

The jury's verdict was and is amply supported by the evidence.

CONCLUSION

The Court's charge on all the issues in this case was eminently correct. The jury's findings are amply supported by the evidence and the judgment dismissing the third-party complaint of the ship-owner against I.T.O. should be affirmed to which ends this brief is

Respectfully submitted,

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Brief is admitted this
13 day of September 1974.

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